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Supreme Court of the United States

OCTOBER TERM, 1962.

DOCKET No. 463.

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of Andres San Martin, deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT, UNITED STATES LINES COMPANY.

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BRIEF OF RESPONDENT, UNITED STATES LINES COMPANY

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1962.

It is not disputed that the jurisdiction of this Court is invoked by virtue of 28 U. S. C. Section 1254 (1) and 2101 (c). However, respondent contends that the granting of the writ, even in its limited scope, was improvident and upon reconsideration should be dismissed. (See Point I of this brief)

STATEMENT

Petitioner's intestate, Andres San Martin, a seaman who died during the pendency of the appeal to the Court of Appeals, sued United States Lines Company, his employer, for injuries allegedly sustained aboard its vessel, the SS. *American Reporter*.

The complaint contained two causes of action. The first cause of action set forth two separate counts under which recovery was sought; (1) Negligence under the Jones Act, 46 U. S. C. 688; (2) Unseaworthiness under the General Maritime Law. The second cause of action was to recover sums allegedly due for maintenance and cure, earned wages and wages to the end of the voyage. (R 2, 3, 4)

There was no allegation of diversity of citizenship set forth in the complaint and petitioner's attorney at no time in the District Court, either before, during or after the trial, ever asserted jurisdiction based upon diversity.

At the outset of the trial and before a jury was selected, the Court, over the objection of San Martin's attorney which was based solely on "pendency," ruled that the second cause of action would be decided by it at the end of the presentation of all the evidence. (R 8, 9)

The action was tried before the Honorable Richard H. Levet and a jury and resulted in a jury verdict for the respondent on both counts of the first cause of action and an award by the Court, sitting without a jury, of $224.00, plus interest, on the second cause of action. Judgment was entered on the 6th day of September, 1960.

The Facts

San Martin, age 62 at the time of trial, joined the SS. *American Reporter* in November, 1953 as a wiper. On November 5, 1954, when the vessel was tied up at the Brooklyn Army Terminal in New York, San Martin claimed that he was injured, while he and two other wipers were engaged in loading engine room stores aboard the vessel from the dock. The stores, in addition to other items, included four 100 pound metal drums of boiler cement and one 200 pound drum.

San Martin testified that while carying a 100 pound drum up the gangway, the drum and gangway moved and he sustained certain injuries which disabled him and necessitated medical treatment. It was for the period that he was disabled and not hospitalized that San Martin sought to recover maintenance and cure.

The Question Presented for Decision

Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?

Petitioner under Point I of his brief says that the question presented "calls upon the Court now to decide the issue left open in the Romero case" 358 U. S. 354. This is not so, which is clear from the language of the majority opinion written by Mr. Justice Frankfurter that appears at page 381 of the opinion and reads as follows:

> "Here we merely decide that a district judge has jurisdiction to determine whether a cause of action has been stated if that jurisdiction has been invoked by a complaint at law rather than by a libel in admiralty, as long as the complaint also properly alleges a claim under the Jones Act. We are not called upon to decide whether the District Court *may* submit to the jury the 'pendent' claims under the general maritime law in the event that a cause of action be found to exist." (Emphasis supplied.)

The question presented by the granting of the writ in the case at bar is not whether a maintenance and cure claim, which is joined with a Jones Act claim *may* be tried to a jury but whether there is a *right* to such a trial under these circumstances.

The Contentions of the Parties

In the first instance, it is the position of the respondent that the writ was improvidently granted, because the Jones Act cause of action, to which it is claimed the maritime cause of action was "pendent", has been extinguished and if this Court reverses the lower court and orders a jury trial of the maritime claim, there will be the anomalous situation of a maritime claim being tried on the civil side of the Federal Court before a jury without being pendent to anything.

In regard to the merits of this appeal, it is the petitioner's contention that even in the absence of diversity, the courts of the United States have the power to, and should, on the basis of judicial policy, *create the right* to a jury trial of a maritime claim for maintenance and cure, if the claimant elects to join this purely maritime claim with a Jones Act claim on the civil side of the Federal Court. In support of this position he invokes the "pendent jurisdiction" doctrine of *Hurn* v. *Oursler*, 289 U. S. 238 (1933) and various "policy considerations."

On the other hand it is the respondent's position that the right to maintenance and cure is strictly a maritime right and that a claim based on such right is purely maritime in nature and continues to be so even though joined in the same complaint, on the civil side of the Court, with a statutory claim such as the Jones Act. Thus, in the absence of diversity, a suit for the enforcement of a maritime right in the Federal Court can only be determined under the court's admiralty jurisdiction, where there can be no jury, "pendency" or "policy considerations" notwithstanding.

The Federal Rules of Civil Procedure apply only to the civil jurisdiction of the Federal Court and have no

application to its admiralty jurisdiction, which is regulated by the Admiralty Rules. While conceding that the Federal Rules of Civil Procedure do not prohibit the joinder, in the one complaint, of a maritime claim with a non-maritime claim on the civil side of the court, respondent contends that such joinder does not create rights, such as the right to a jury trial of a maritime claim which has never been recognized.

The respondent will show that the right to a jury trial of a maritime claim can only be derived from the Constitution or Congressional grant. The Constitution gives no such right and Congress has not exercised its power to create such a right, except in certain suits not applicable to the case at bar. Accordingly such a right cannot now be created for the petitioner by this Court, merely because he elected to join his purely maritime claim with his Jones Act claim and regardless of policy considerations.

POINT I

THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

The writ of certiorari granted in this matter was limited to the question:

> "1. Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?"

However, the "claim for Jones Act negligence" no longer exists. It was disposed of and extinguished by the jury verdict which was affirmed by the Court below, an affirmance which this Court declined to review, 371 U. S. 932.

Thus the remaining "claim for unpaid maintenance and cure" stands alone.

The concrete fact which conclusively shows the independence of the maintenance and cure claim from the "claim for Jones Act negligence" is the judgment of the trial court (affirmed by the Court of Appeals, as not clearly erroneous) granting a recovery on the maintenance and cure claim in the sum of $224.00 plus interest, despite the other concrete fact that the petitioner's claim under the Jones Act has been extinguished by the jury verdict. Surely, if the claim for maintenance and cure were dependent on the Jones Act claim, a recovery on the maintenance and cure claim would be inconsistent. The result is, of course, in accord with the fundamental legal principle stated in *Pacific Steamship Company* v. *Peterson*, 278 U. S. 130, 138 that the right of maintenance and cure, "is independent of the right to indemnity or compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative."

Consequently, there is no room left in this case to decide the now abstract issue of whether a claim under the Jones Act, joined with a claim for maintenance and cure should as of right be considered at one trial before a jury.

The dissenting opinion of Judge Clark in the Court below, which may have moved this Court to grant the petition for the writ, does not assert that the Jones Act (which by its terms gives a "right of trial by jury") is a Congressional grant of a statutory right to a trial by jury of a maintenance and cure claim when joined with a Jones Act claim. Indeed, the opinion abjures reliance on "pendent" jurisdiction, which does not govern the mode of trial but rather the question of access to the Federal Court. Instead, arguments of expedience are advanced, in which a maintenance and cure claim is referred to as a "single claim or cause" when joined with a Jones Act claim (which

it surely is not), supported by such phrases as "practical convenience and necessity"—"there should be only one cause of action for jurisdiction and hence for trial. When a seaman has been injured his total claim should not be butchered up. He should be able to put it forward either wholly in admiralty without any right of jury trial, or wholly at law with a right of jury trial on all the issues"; all to buttress the conclusion that "we are constrained to conclude that we must go where reason and practical necessity take us, namely to the unitary form of approach and the resulting trial by jury as we have outlined."

If this Court has granted certiorari on the basis of "practical convenience and necessity" and the "unitary form of approach", such a grant is surely improvident, for the concept of a "unitary form of approach" or "total claim" can never be applied to a solitary claim. "Practical convenience and necessity" cannot sustain a retrial of plaintiff's only surviving claim even if it would have been practical and convenient to have a "unitary" trial of all the claims, when they first were presented to the trial court.

As stated in *The Monrosa et al.* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 184:

> "Examination of a case on the merits, on oral argument, may bring into 'proper focus' a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, *supra*, at 73.
>
> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of

> the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly."

This Court has repeatedly held that it "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." *California* v. *San Pablo and Tulare R. R. Co.*, 149 U. S. 308, 314. Unless there is an actual "controversy" to be decided it would be improper to render a decision for the purpose of advising the courts how to proceed in future cases as a matter of judicial administration.

POINT II

THE RIGHT TO A JURY TRIAL IN A MARITIME CASE CAN ONLY BE DERIVED FROM THE CONSTITUTION OR CONGRESSIONAL GRANT. THE CONSTITUTION DOES NOT PROVIDE FOR SUCH A RIGHT NOR HAS CONGRESS GRANTED IT EXCEPT IN CERTAIN CASES NOT HERE APPLICABLE.

The doctrine of maintenance and cure is of ancient origin and can be traced back to the sea codes of the Middle Ages. It was adopted in England during the reign of Richard I (1189-1199) and was carried over into the Vice Admiralty courts of Colonial times. These courts had jurisdiction over admiralty matters, including claims for maintenance and cure, in America, prior to the adoption of the Constitution. In the trial of these matters there was no jury. *Hendry* v. *Moore*, 318 U. S. 133.

Thus at the time of the adoption of the Constitution there existed in America an admiralty and maritime jurisdiction, in which maritime claims including maintenance and cure were heard and determined without benefit of a jury. The framers of the Constitution had this jurisdiction in mind as it then existed and in setting forth the judicial power of the United States provided for the continuance of this jurisdiction in Article III, Section 2, Clause 1, which read "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." This provision adopted the principles of maritime law that existed prior to the Constitution as well as the procedure for applying this law and incorporated both into the maritime law and practice of the United States.

The purpose of the framers was to place the then existing admiralty system including its substantive and procedural features under national control "because of its intimate relation to navigation and to interstate and foreign commerce." *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375 (1924).

As Mr. Justice Van Devanter said in the *Panama Railroad Co.* case at p. 385:

> "Such a law or system of law existed in Colonial times and during the Confederation and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation

> to navigation and to interstate and foreign commerce."

It is clear, therefore, that the Constitution did not grant a right to a jury trial in admiralty and maritime cases but instead adopted a system that had proved workable for centuries, in which there was no jury trial.

Article III of the Constitution, in addition, granted to Congress the power to create such inferior federal courts as it deemed necessary and proper. Congress in the First Judiciary Act of 1789 exercised this power and created inferior courts and invested them with admiralty and maritime jurisdiction. It is well settled that these courts were not common law courts or courts of general jurisdiction "... but are strictly limited to the Jurisdiction conferred upon them by Congress." *Jordine* v. *Walling*, 185 F. 2d 662, 667.

The language of the Act does not show any intent by Congress to confer a right of jury trial in admiralty and maritime cases but merely an intent to preserve such common law remedies as were available to suitors in the common law courts of the Colonies or States prior to the adoption of the Constitution. Thus, the inferior courts in exercising the admiralty and maritime jurisdiction conferred upon them could only do so according to the procedure in admiralty in which trial by jury was not allowed. *Jordine* v. *Walling*, *supra*.

Mr. Justice Frankfurter in *Romero* v. *International Terminal Operating Co., Inc.*, 358 U. S. 354 points this out at page 362.

> "Section 9 not only established federal courts for the administration of maritime law; it recognized that some remedies in matters maritime had been traditionally administered by common-law courts of the original States. This role of the States in the

> administration of maritime law was preserved in the famous 'saving clause' . . . Since the original Judiciary Act also endowed the federal courts with diversity jurisdiction, common-law remedies for maritime causes could be enforced by the then Circuit Courts when the proper diversity of parties afforded access . . . The District Courts, endowed with 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction', sat to enforce the comprehensive federal interest in the law of the sea which had been a major reason for their creation. This jurisdiction was exercised according to the historic procedure in admiralty, by a judge without a jury.'"*

Thus it is clear that from their very inception, the inferior courts of the United States had jurisdiction over claims for maintenance and cure but only in admiralty where there was no right to a trial by jury.

The Judiciary Act of 1789 did not authorize the inferior courts to give a jury trial when Congress had not provided for it. As was said in *Cara* v. *Curtis*, (1845) 3 How. 236, 11 L. Ed. 576, the inferior courts were not only dependent upon Congress for their very existence and jurisdiction but for the exercise of that jurisdiction including the modes of trial. See also *Lockerty* v. *Phillips*, (1943) 319 U. S. 182.

Congress to the present day, with the exception of the Jones Act 46 U. S. C. Section 688 and the Great Lakes Act 28 U. S. C. Section 1873, has not enlarged the jurisdiction of the Federal Courts to the extent that there is a right to a jury trial on a purely maritime claim in the absence of diversity.

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* The *Romero* case was followed by a unanimous Court in *Aho* v. *Jacobsen*, 359 U. S. 25 (1959), when the Court remanded the case "for retrial on the admiralty side."

POINT III

THE PENDENCY DOCTRINE OF *Hurn* v. *Oursler*, 289 U. S. 238 (1933) RELATES TO THE JURISDICTION OF THE FEDERAL COURT TO DECIDE A CLAIM AND NOT TO THE MODE OF TRIAL. ACCORDINGLY THIS DOCTRINE IS NOT APPLICABLE TO THE QUESTION PRESENTED.

Judge Friendly in the opinion below noted that this Court in *Romero* v. *International Terminal Operating Co., Inc.*, 358 U. S. 354 recognized the anomaly of applying the *Hurn* doctrine in a case where the court already had jurisdiction over the claim asserted to be pendent. He said at P. 473:

> "The Supreme Court pointed out in Romero, 358 U. S. 380-381, 79 S. Ct. 468, 3 L. Ed. 2d 368, the anomaly of applying the 'pendent jurisdiction' doctrine of *Hurn* v. *Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933)—that the assertion of a Federal claim permits a Federal court to decide a sufficiently related non-Federal claim otherwise outside its jurisdiction—to a claim for maintenance and cure which is always within Federal jurisdiction under 28 U. S. C., Section 1333 (1), as, indeed, both Judge Medina and Judge Lumbard had done a few weeks earlier in Bartholomew, 263 Fed. 2nd 449, 455."

In conclusion Judge Friendly said that the *Hurn* doctrine of pendency, as developed by this Court is related to the jurisdiction of a Federal Court "to decide a claim—not to the mode of trial; . . .". This conclusion was justified because there is nothing in the *Hurn* opinion suggesting that once pendency is established, the pendent claim ac-

quires, as a matter of right, the mode of trial of the principal claim.

As Judge Friendly said, P. 473:

> ". . . no one has ever supposed that joinder of a 'state' equitable claim with a related 'federal' legal claim under Hurn *v.* Oursler entitled the former to a jury trial. We see no reason for a different result when the joined claim is a Federal claim arising under the general maritime law."

Accordingly there appears to be no sound basis for extending the pendency doctrine and granting a jury trial on a maritime claim for maintenance and cure especially when, as has been pointed out above, the power to grant such a trial rests solely in the Constitution and Congress. Also such an extension could not be reconciled with the Federal Rules of Civil Procedure, promulgated by this Court under the authority granted to it by Congress, which expressly limits the class of cases afforded a jury trial as a matter of right and in which class maritime claims are not included.

POINT IV

THE FEDERAL RULES OF CIVIL PROCEDURE GOVERN A CLAIM FOR MAINTENANCE AND CURE THAT IS JOINED WITH A JONES ACT CLAIM BUT THESE RULES DO NOT GIVE A RIGHT TO A JURY TRIAL OF THE MAINTENANCE AND CURE CLAIM AND IN FACT EXPRESSLY PROHIBIT IT.

The Jones Act 46 U. S. C. Section 688, by explicit provision permits a seaman to sue in an action at law for damages with the right of trial by jury. As such it is

governed by the Federal Rules of Civil Procedure, even though an action brought pursuant to it, by a seaman, is basically a maritime claim.

Rule 18(a) of the Federal Rules of Civil Procedure, provides for the joinder of "claims either legal or equitable or both". A claim for maintenance and cure although not strictly "legal or equitable in nature" is embraced within this Rule and therefore can be properly joined in the same complaint with a Jones Act cause of action. As Judge Friendly said, the above quoted words were used in the Rule not for the purpose of preventing the joinder of claims under the maritime law, which had already been permitted in the courts but rather "to prevent future judicial adherence to traditional distinctions against the joinder of legal and equitable claims" (P. 469).

In the event there is a joinder of claims in one complaint, in which the right to a jury trial exists in one but not the other, then as pointed out by Judge Friendly "each is to be given the mode of trial appropriate to its nature, *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469 (1962); *Ring* v. *Spina*, 166 F. 2d 546, 550 (2 Cir.), Cert. denied, 335 U. S. 813 (1948); *Orenstein* v. *United States*, 191 F. 2d 184 (1 Cir. 1951); *Tanimura* v. *United States*, 195 F. 2d 329 (9 Cir. 1952); *Leimer* v. *Woods*, 196 F. 2d 828 (8 Cir., 1952); *Schaefer* v. *Gunzburg*, 246 F. 2d 11, (9 Cir.), Cert. denied, 355 U. S. 831, (1957); *Chappell & Co.* v. *Palermo Cafe Co.*, 249 F. 2d 77 (1 Cir. 1957), . . .".

The Federal Rules of Civil Procedure in Rules 38 and 39 "clearly and comprehensively" provide for the mode of trial in all actions in which they are applicable. The Rules do not provide for jury trials in actions, where such a right did not exist prior to their adoption. They merely assure the preservation of the right to a jury trial in all

cases, where such a right previously existed, namely under the Seventh Amendment of the Constitution and statutes of the United States.

Rule 39 specifically states that unless a right of trial by jury of some or all of the issues tendered exists under the Constitution or statutes of the United States then there shall be no jury trial with respect to them. It reads as follows:

> Rule 39
>
> (a) "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless . . . (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Accordingly, if the court granted a jury trial of a claim not triable as of right under the Constitution or statute of the United States, it would be doing so in direct violation of the Rules.

The petitioner, obviously, cannot claim a right to a jury trial on his claim for maintenance and cure under the Seventh Amendment to the Constitution because that amendment is limited to "suits at common law" involving legal rights. A maintenance and cure suit deals with rights and remedies maritime rather than legal in nature. As was said by this Court over a century ago the Amendment is "limited to rights and remedies peculiarly legal in their nature," *Shields* v. *Thomas*, 59 U. S. 253, 262 (1856).

Thus the only possible right to a jury trial on petitioner's claim for maintenance and cure would be under

a statute of the United States, which in the case at bar could only be the Jones Act.

It is clear from the Jones Act itself, that there is no explicit language providing that the claim of a seaman for maintenance and cure is to be considered as part of the Act. The Jones Act expressly and solely deals with the right of a seaman to recover damages for personal injuries based upon negligence. Neither does the language of the Act nor the background, which prompted its enactment, indicate any intent or purpose by Congress to include implicitly a claim for maintenance and cure as part of the Act.

Prior to the enactment of the Jones Act in 1920, a seaman could not recover damages for personal injuries resulting from the negligence of his fellow servants. It was to remedy this situation that Congress enacted the Jones Act. Congress was not concerned with incorporating under its provisions, the then existing rights that a seaman had under the doctrines of unseaworthiness and maintenance and cure. If Congress was at all interested in such an objective, it would have taken very little to accomplish this in the wording of the Act. The fact that nothing was mentioned in the Act regarding these already existing rights of seamen, strongly supports the view that Congress intentionally omitted them from the Act and left the seamen with these rights, and the remedies to enforce them, as they then existed. To now hold that Congress must have intended that a maintenance and cure claim should become part and parcel of a Jones Act claim, so that the right to a jury trial exists with respect to the former, would be nothing more than judicial legislation and in complete disregard of the obvious intentions of Congress.

Aside from the above there is little, if any, merit to the claim of the petitioner that his maintenance and cure claim

is so intertwined with the Jones Act claim that he should be given a right to a jury trial in regard to the former. The only possible intertwining of petitioner's Jones Act claim and his maintenance and cure claim is the fact that they both arose out of the same incident. From that point on, the intertwining ceases, not only because of the diverse nature of each claim, but because of what each seeks to achieve.

The Jones Act claim is legal in nature and sounds in tort, whereas the maintenance and cure claim "has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident", *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932). Each claim is wholly independent and distinct from the other. In the one, damages are sought and usually in an amount far exceeding that recoverable in the other. An adjudication with respect to one claim is not necessarily res judicata with respect to the other. The element of proof necessary to establish a Jones Act claim is more extensive and burdensome than that to support a maintenance and cure claim. In connection with the latter all that it is necessary to show is that an injury was sustained in the service of the ship and the extent of the period of disability. As to the former, in addition to proving an injury in the service of the ship, a seaman must satisfactorily establish all the necessary elements of negligence including notice. Also the limitations on the time to sue in each is different.

Thus the separate, distinct and independent nature of the two causes of action cannot be disputed and there is no reasonable basis for considering a maintenance and cure claim, as part of the Jones Act claim, either as being intended as such by Congress or by intertwining efforts, so as to create the *right* to a jury trial in such a claim.

CONCLUSION

Petitioner's claim for maintenance and cure, which was joined with his Jones Act claim, is no longer pendent to it, the latter having been extinguished. Therefore, a reversal now and the direction of a new trial by this Court would not answer the question presented, because a new trial would involve the maintenance and cure claim alone and would be before a different jury than the one that decided the Jones Act claim. This would result in the anomalous situation of a maritime claim being determined by a jury on the civil side of the Federal Court. Under these circumstances the writ was improvidently granted.

A right to maintenance and cure is strictly a maritime right and in the absence of diversity of citizenship is only cognizable under the admiralty jurisdiction of the Federal Court, although it may be joined in the same complaint with a civil action.

The right to a jury trial in the Federal Court can only be derived from the Constitution or from statutes of the United States. There is no Constitutional right to a jury trial in a maintenance and cure cause of action and Congress up to the present has never seen fit to enact legislation creating such a right.

In the absence of Congressional grant there can be no right to a jury trial of a claim for maintenance and cure pendency and policy considerations notwithstanding.

A maintenance and cure cause of action is separate and independent from a Jones Act cause of action and cannot be considered either expressly or impliedly a part of the Jones Act so as to give a right to a jury trial. Neither is a main-

tenance and cure claim so intertwined with a Jones Act claim that it can be carried along with it into the jury room.

The question presented should be answered in the negative.

Respectfully submitted,

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